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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the petitioners with written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to various civil rights and equal employment laws, including Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, *et seq.* and 2000e, *et seq.* Many EEAC members are signatories to conciliation agreements, consent decrees or other voluntary resolutions of civil rights or employment discrimination charges. This case concerns simultaneous negotiation of the merits and attorney's fees of a civil rights claim under 42 U.S.C. § 1988, which covers employers subject to 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* In addition, a "prevailing party" under Title VII is permitted "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant

case—*i.e.*, whether the court of appeals erred in disapproving a waiver of attorney's fees and costs negotiated simultaneously with the merits as part of a settlement approved by the lower court.

The decision by the Ninth Circuit barring nearly all simultaneous negotiation of fees and the merits would greatly reduce the number of class action settlement negotiations involving Title VII and other discrimination and civil rights statutes. An employer must know at the time of settlement the total cost, including attorney's fees, of the settlement agreement. Moreover, the Ninth Circuit's approach frustrates the policy encouraging voluntary compliance and the settlement of civil rights class actions, Title VII and other discrimination laws. *See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983). Clearly, the voluntary resolution through settlement, especially where a class action is involved, "constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the judicial system." *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (Torruella, J., concurring on separate grounds).

Because of its interest in urging the settlement of employment discrimination cases, EEAC has filed briefs as amicus curiae with this Court in *W.R. Grace & Co.*, *supra* and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In addition, because of its interest in the issue of attorney's fees, EEAC has filed briefs in *Webb v. Board of Educ. of Dyer County*, 105 S.Ct. 1923 (1985); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), among others. In addition, EEAC filed a brief as amicus curiae in *Moore v. National Ass'n of Securities Dealers*,

Inc., 762 F.2d 1093 (D.C. Cir. 1985), *petition for reh'g filed* July 8, 1985, *decision held in abeyance*, a case which discusses the decision of the court of appeals below, and which deals at length with the issue addressed herein.

STATEMENT OF THE CASE

The attorney for a class of plaintiffs ("plaintiff") sued various officials of the State of Idaho ("defendant"), alleging violations of several federal and state constitutional and statutory provisions. The complaint, filed pursuant to 42 U.S.C. § 1983, sought declaratory and injunctive relief, as well as attorney's fees and costs, pursuant to 42 U.S.C. § 1988.

The action included claims for educational and mental health services on behalf of Jeff D. and other children. The parties settled the educational services claim and, following the completion of extensive discovery, began settlement negotiation regarding the mental health services claim. Defendant offered the injunctive relief requested by plaintiff, but conditioned settlement upon plaintiff's waiver of attorney's fees and costs. Plaintiff agreed to negotiate a settlement with a stipulation that the simultaneous negotiation of fees must be approved by the district court. (J.A. 104-105).[1]

The district court found the practice of negotiating fees along with the merits ethical, and approved the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. (J.A. 93-94). Plaintiff then filed a motion for attorney's fees and costs, which the court denied based on the settlement. (J.A. 106-07). Plaintiff appealed.

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[1] "J.A." refers to the Joint Appendix.

The Court of Appeals for the Ninth Circuit reversed the judgment of the district court, and remanded for a determination of reasonable attorney's fees. The Ninth Circuit held that the lower court erred in approving plaintiff's waiver of attorney's fees simply because it was part of the settlement, concluding that absent unusual circumstances, "[t]he historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Jeff D. v. Evans*, 743 F.2d 648, 652 (9th Cir. 1984), *cert. granted*, 105 S. Ct. 2319 (1985). Defendant appealed.

SUMMARY OF ARGUMENT

The overriding public interest in favor of class action settlements supports the simultaneous negotiation of attorney's fees along with the merits. While Section 1988 permits an award of attorney's fees to a successful plaintiff, fees may be waived as long as the waiver is "voluntary and knowing." In addition, the adoption of a strict rule preventing simultaneous negotiation except in unusual circumstances would result in fewer class action settlements because defendants must know the full extent of liability while contemplating settlement. *See, e.g., White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 453 n. 15 (1982). Further, a bifurcated court settlement process would permit the leverage of a weak claim, consume inordinate amounts of judicial resources, require a judge to determine the reasonableness of a plaintiff's request on the merits without regard to the reasonableness of the fee request, and

cause practical and logistical problems for the court system. *See Lazar*, 757 F.2d 435.

While plaintiff's concern regarding the dilemma faced in simultaneous negotiation has some initial appeal, the overbroad rule adopted by the Ninth Circuit would prevent simultaneous negotiation in many proper instances. For example, simultaneous negotiation should be permitted when plaintiff initiates the waiver of fees, when defendant offers a "lump sum" settlement, or when there exists a carefully drafted retainer agreement or written consent from all parties. Further, the overbroad rule adopted by the Ninth Circuit below creates a presumption that simultaneous negotiation is unethical, when in fact plaintiff should bear the burden of showing why it did not prepare for the dilemma with a retainer agreement, or raise the issue with the lower court judge with a motion or when presenting the proposed settlement.

The Ninth Circuit below also failed to defer to the lower court's approval of the settlement even though the district judge considered the ethical dilemma and exercised his discretion to approve the settlement. Thus, the Ninth Circuit improperly reversed the lower court, even though it made no finding that the lower court abused its discretion in approving the settlement. *See, e.g., Mendoza v. United States*, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

As an alternative, if this Court finds the simultaneous negotiation herein to have been improper, the parties should be allowed to renegotiate the settlement or proceed to trial. Defendant agreed to plaintiff's demand on the merits as a condition to the

waiver of fees. The award of both the merits relief agreed to and fees to plaintiff would result in an impermissible alteration of the agreement and would impose a term materially different from that agreed upon.

ARGUMENT

I. THE DECISION BELOW BARRING SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES AND THE MERITS IN A CIVIL RIGHTS CLASS ACTION UNDERMINES THE POLICY FAVORING VOLUNTARY RESOLUTION, IMPOSES AN OVERBROAD RULE WHICH OVERLOOKS THE ROLE OF THE DISTRICT JUDGE IN OVERSEEING THE SETTLEMENT OF THE CLAIM, AND FAILS TO AFFORD SUFFICIENT DISCRETION TO THE DISTRICT COURT

In the instant case, the district court judge approved the voluntary settlement by plaintiff and defendant of attorney's fees and the merits in a civil rights class action. The court of appeals, however, reversed the bargained settlement, creating a rule that would permit simultaneous negotiation of attorney's fees, if at all, only in very narrow and unusual circumstances. As will be shown below, the Ninth Circuit's rule conflicts with and undermines the policy of voluntary resolution of claims. In addition, the court's rule overstates the need for a restrictive ban on simultaneous negotiation, since there are many instances in which such negotiations should be permitted to take place, and since the district court's close supervision will prevent any improper settlements.

A. The Policy Favoring Voluntary Resolution of Civil Rights Class Actions Supports a Rule Permitting Simultaneous Negotiation

The language of Section 1988 neither prohibits nor approves the simultaneous negotiation of fees with the merits, simply stating that a court may, in its discretion, allow fees to a prevailing party. 42 U.S.C. § 1988. Courts have emphasized, however, the "overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved." *Lazar* v. *Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (Torruella, J., concurring on separate grounds). *See Airline Stewards and Stewardesses Ass'n, Local 550 v. TWA, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *petition for rehearing denied*, 456 U.S. 940 (1982); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).[2]

In addition, Section 1988 does not mandate an award of fees to a prevailing party, but rather authorizes a court, in its discretion, to award them. This authorization certainly does not prevent a knowing and conscious waiver of fees. *See, e.g., Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127 (10th

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[2] This policy favoring compromise and settlement is particularly strong in employment discrimination cases, where both Congress and the courts clearly have recognized that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in*, 1964 U.S. Code Cong. & Ad. News 2355, 2393.

Cir. 1980); *White v. New Hampshire Dept. of Employment Sec.*, 629 F.2d 697, 701 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982). *See also Gram v. Bank of Louisiana*, 691 F.2d 728 (5th Cir. 1982). As the concurring judge in *Lazar* explained:

> It cannot be questioned but that, in an appropriate case, plaintiffs, including those in a class action, can accept a settlement without any monetary damages being recovered notwithstanding that the suit initially included such a claim, or that the same result cannot be achieved with respect to equitable relief, or costs. In fact, *if constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise.*

Lazar, 757 F.2d at 439 (emphasis supplied) (footnote omitted).

The Ninth Circuit conceded that plaintiff "did indicate willingness to forego fees if the court approved," and noted that stipulations generally are binding upon the parties. *Jeff D. v. Evans*, 743 F.2d 648, 650 (9th Cir. 1984), *cert. granted*, 105 S. Ct. 2319 (1985). The Ninth Circuit, however, improperly engaged in the "excess in paternalism" described in *Lazar* when it reversed the bargained settlement, reasoning that plaintiff was not allowed to waive attorney's fees as part of a simultaneous negotiation of fees and the merits.

This Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52, clearly indicated that "an employee may waive his cause of action under Title VII as part of a voluntary settlement." This Court further stated that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the

outset that the employe's consent to the settlement was voluntary and knowing." *Id.* at 52 n. 15; *see also United States v. Trucking Employers, Inc.*, 561 F.2d 313, 318 (D.C. Cir. 1977). The consent given by plaintiff in the instant case was both voluntary and knowing. Certainly, there is no countervailing reason why a waiver of attorney's fees and costs in a Section 1988 class action should not be governed by the same principle of "voluntary and knowing" waiver. *See e.g., Herman v. Eagle Star Insurance Co.*, 396 F.2d 427 (9th Cir. 1968).

In fact, the only possible explanation given by the court below why a plaintiff is not bound by a voluntary and knowing waiver of attorney's fees which has been approved by a district court is that there exists a "clear public policy of 42 U.S.C. § 1988 to award reasonable attorney's fees in civil rights actions." *Jeff D.*, 743 F.2d at 650. Such an argument hardly constitutes sufficient grounds for making attorneys' fees unwaivable. While plaintiff claims that the instant "class action would probably never have been brought without the attorneys' fees provision of 42 U.S.C. § 1988," see Reply Brief in Opposition to Petition for Writ of Certiorari at 10, one court has observed that "it is doubtful that Congress envisioned that [Section 1988] would become the catalyst for litigating a claim which otherwise would be settled." *Skoda v. Fontani*, 519 F.Supp. 309, 310 (N.D. Ill. 1981). *See* Comment, *Settlement Offiers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations*, 131 U.Penn. L. Rev. 793, 816 (1983).

The Ninth Circuit below similarly neglected to consider the practical ramifications that the adop-

tion of its rule would have in the settlement process. The settlement of cases involves a careful negotiating process in which the parties seek to resolve their differences based upon, among other factors, their evaluation of the evidence, their likelihood of success on the merits, their potential liability for costs and fees, and the overall "costs" of litigation. The viability of any settlement rests largely on the ability of each party to gauge precisely what it will and will not receive through the settlement. This delicate balance that is essential to the settlement process would be undermined if either party (in this case the defendant) were uncertain as to the ultimate liability incurred under a settlement agreement.

In *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 (1982), this Court was asked to adopt a rule deferring fee negotiations until after the entry of judgment. In rejecting such a rule, Justice Powell stated that:

> In considering whether to enter a negotiated settlement, *a defendant may have good reason to demand to know his total liability from both damages and fees.* Although such situations may raise difficult ethical issues for plaintiff's attorney, *we are reluctant to hold that no resolution is ever available to ethical counsel. Id.*, at 453-54 n.15 (emphasis supplied).

The recognition by Justice Powell in *White* that a defendant has good reason to want to know the total liability incurred in a settlement was echoed recently in Chief Justice Burger's opinion in *Marek v. Chesney*, 53 U.S.L.W. 4903, 4905 (U.S. June 25, 1985) (No. 83-1437). The Chief Justice noted that defendant's offer under Rule 68 of the Federal Rules of

Civil Procedure must "be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.*" (emphasis by the Court). This Court reasoned:

> This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.

Id.

In fact, Chief Justice Burger and Justice Rehnquist, in their dissent in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), reasoned persuasively that attorney's fees should be subject to settlement and compromise under Rule 68. Justice Rehnquist stated that:

> Were we to hold that attorney's fees were *not* subject to settlement and compromise (in the same way as the issues of liability, damages, and other remedies) as a part of a Rule 68 offer, we would frustrate the purpose of this Rule. *The defendant would be put in the unenviable position of having to make an offer of judgment without knowing what his potential liability in terms of attorney's fees would be* over and above the amount of the Rule 68 offer. *Id.*, at 379 n.5 (emphasis supplied).

Justice Rehnquist went on to state that the uncertainty of liability for fees "will most likely prove to deter the client from making a Rule 68 offer in the first place, with the result that fewer suits will be settled and more will be tried." *Id.* Thus, the practical effect of the rule adopted by the Ninth Circuit will be that fewer defendants will consider a settlement on the merits if liability for attorney's fees is still unknown. This effect clearly frustrates the purpose of the various civil rights statutes, which is to encourage negotiation and settlement.

On the other hand, permitting the simultaneous negotiation of fees and merits ultimately could lead to a desirable result, depending upon the strength or weakness of plaintiff's case. Senior Circuit Judge MacKinnon, writing for the court in *Moore*, explained that:

> a plaintiff's costs and fee waivers are most likely to occur in instances where the plaintiff's case is relatively weak and the defendant is willing to predict with some degree of certainty that it would prevail on the merits should the case proceed to trial. Where a plaintiff's case is relatively stronger, the plaintiff's bargaining power will be commensurately greater. Thus, the plaintiff should be able to exact additional concessions from the defendant, including fees and costs.

Moore v. *National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093, 1105 (D.C. Cir. 1985), *petition for reh'g filed* July 8, 1985, *decision held in abeyance. See* Note, *Attorneys' Fees-Conflicts Created by Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action*, 51 Temple L.Q. 799, 811 (1978). By preventing simultaneous negotiations, the court below would improperly create a rule encouraging the lever-

age of a weak claim, while it should encourage the proper settlement of such a case long before it crowds the court's calendar.

In addition, the decision of the court below would lead to a "bifurcated" court settlement process involving a first-stage resolution of the merits and a second-stage negotiation of attorney's fees. This Court rejected the plaintiff's argument that Rule 68 of the Federal Rules of Civil Procedure mandates a bifurcated offer, noting that the rule does not "require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs." *Marek*, 53 U.S.L.W. at 4905. In fact, this form of negotiation is hardly superior to the simultaneous negotiation of fees and merits in any context; rather, the method is so replete with problems as to render it unworkable. First, even its supporters concede that there would have to be increased judicial involvement in the two stage process "necessitating expenditure of additional and inordinate amounts of judicial resources." *See* Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. Colo L. Rev 341, 373 (1984). Second, a bifurcated approach would lead to a segregation of the facts, making the district judge determine the reasonableness of plaintiff's claim on the merits without regard to the reasonableness of the fee request. 51 Temple L.Q. at 812. Finally, the bifurcated approach would lead to practical and logistical problems for the court system. As the concurring judge in *Lazar* noted:

> Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved. In these days of crowded court calen-

> dars, complex disputes, and tardy results, there can be no doubt but that the voluntary resolution of litigation through settlement, constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the judicial system. The removal of attorney's fees from the arena of voluntary and ethical negotiation in civil rights cases would present an unnecessary discouragement to non-litigious disposition of these controversies.

Lazar, 757 F.2d at 440 (Torruella, J., concurring on separate grounds) (footnote omitted).[3] Thus, it is clear that the policy of voluntary resolution in civil rights class actions supports simultaneous negotiation of fees and the merits. This same policy does

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[3] Other circuits have decided against following a rule like that established by the Ninth Circuit. The First Circuit, as noted fully, *supra*, permits waiver of attorney's fees. *Lazar*, 757 F.2d at 438. The Fifth Circuit approves of a plaintiff's waiver of attorney's fees in a negotiated settlement, *Gram*, 691 F.2d at 730, but cautions that simultaneous negotiations "may raise serious ethical concern." *Pettway*, 576 F.2d at 1216 n. 71. The Seventh Circuit has upheld simultaneous negotiation, albeit without discussion of the *per se* rule articulated in *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977). Even the Eighth Circuit refrained from adopting a *per se* rule, while it noted the potential conflict of interest in simultaneous negotiation, which the trial judge must scrutinize closely. *Obin v. District No. 9, Int'l Ass'n of Machinists and Aerospace Workers*, 651 F.2d 574, 582-83 (8th Cir. 1981). In *Chicano Police Officer's Ass'n*, 624 F.2d at 132, the Tenth Circuit noted that plaintiffs could waive fees as part of the settlement, even though the case was remanded on another issue. Finally, as discussed fully, *infra*, the District of Columbia Circuit permitted a plaintiff's voluntary waiver of fees during simultaneous negotiation. *Moore*, 762 F.2d at 1110.

not support the unworkable bifurcated system of settlement adopted by the Ninth Circuit.

B. The Standard Used by the Court Below, that Simultaneous Negotiation is Presumptively Unethical and Must be Reversed Even if Approved by the District Judge, is Overbroad

The concerns expressed by plaintiff regarding the dilemma faced in simultaneous negotiation of attorney's fees and the merits in a class have some superficial appeal. These concerns, however, are not compelling when examined closely. In fact, the strict rule adopted by the Ninth Circuit, that simultaneous negotiation is presumptively unethical, does not comport with reality. As evidence of this, both courts and local bar organizations have recognized instances in which simultaneous negotiation should be allowed.

For example, the plaintiff in *Moore* initiated settlement negotiation and introduced for the first time the fee waiver settlement offer. Contrary to plaintiff's charges, the court found that defendant never "demanded" a fee waiver; rather defendant declined plaintiff's initial offers of settlement. *Moore*, 762 F.2d at 1102, 1104.[4] The court held that such an offer "poses no threat to the policies of Title VII enforcement while furthering the public policy in favor of encouraging voluntary settlement of disputes." *Id.* at 1110. Absent coercion, even opponents of simultaneous negotiation agree that a plaintiff's offer of waiver

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[4] Significantly, the majority rejected the dissent's proposed rule characterizing simultaneous negotiations as "presumptively invalid absent 'unusual circumstances,'" (the rule adopted by the court of appeals in the instant case) as displaying an implicit lack of trust in an attorney's ability to engage ethically in negotiations. *Id.* at 1004 n. 15.

of fees poses no threat to Section 1988, 131 U. Penn. L. Rev. at 815. Thus, this Court should permit simultaneous negotiation where plaintiff offers a waiver of fees.[5]

Similarly, a defendant's offer of a lump sum settlement should be allowed. The District of Columbia Legal Ethics Committee ruled that a defendant "may offer a single sum in settlement of the claims against defendant for both damages and attorneys' fees." District of Columbia Bar Legal Ethics Committee, Opinion No. 147, *reprinted* in 113 The Daily Washington Law Reporter 389 (1985). *C.f.* Draft *Manual for Complex Litigation* § 23.2.4 (2d ed. 1985). Even though it did not discuss class actions in particular, the District of Columbia Bar Committee explained that it:

> is not prepared to find that offers of a single sum by a defendant in settlement of Title VII or other similar litigation is unethical. *Society's interest in encouraging disposition of these and other cases through compromise, and a defendant's legitimate interest in defining his liability by settlement in lieu of trial, both require that*

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[5] In his dissent in *Moore*, Circuit Judge Wright seeks to illustrate the "illusory nature" of the distinction between "plaintiff-suggested and defendant-coerced waiver," noting that the District of Columbia Circuit "should hold that simultaneous negotiation of fees and merits is unacceptable, unless unusual circumstances justify such negotiation." *Moore*, 762 F.2d at 1114, 1118. Senior Circuit Judge MacKinnon properly termed such a contention "paternalistic." *Id.* at 1104 n. 15. Judge Toruella similarly noted that allowing the waiver of constitutional rights but disallowing the waiver of fees by an attorney *per se* if negotiated along with the merits constitutes an "excess in paternalism." *Lazar*, 757 F.2d at 439 (concurring opinion).

> *this type of offer should be encouraged, not hindered.* (emphasis supplied).

The Committee noted that plaintiff's attorney must make full disclosure of any conflict the offer creates. This lump sum offer, both well intentioned and encouraged by settlement policy, would be prohibited under the Ninth Circuit's rule. This Court, therefore, should not allow such a rule to stand.

Other situations involving simultaneous negotiation should also be permitted. For example, a carefully drafted retainer agreement between the class and attorney, which contemplates settlement contingencies or vests the statutory fee recovery in the client, should be allowed, even encouraged. Such an agreement is important because it would disclose the attorney's interest in the outcome of the case and memorialize the intentions of the parties. Calhoun, 55 U. Colo. L. Rev. at 353. Senior Circuit Judge MacKinnon in *Moore* noted that under this method, "the attorney and client would no longer have the independent claims for fees which create the conflicts of interest in simultaneous negotiations." *Moore*, 762 F.2d at 1105 n.17; *See, e.g., Brown v. General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983). Of course, plaintiff can always move for a court conference to discuss any dilemma involving simultaneous negotiation under Federal Rules of Civil Procedure 16 or 23. *See* Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized*, 14 Clearinghouse Rev. 515, 520-21 (1980).

As a corollary to the carefully drafted retainer agreement, an attorney facing such a dilemma may obtain written consent from all parties, including the members of the class, and exercise independent

professional judgment for the class in settling the claim on the merits. In this situation, it is important that the attorney make an offer that is as informed and intelligent as possible. *See generally* Advisory Opinion No. 39, State Disciplinary Board of the State Bar of Georgia (July 20, 1984).[6]

Granted, in the instant case plaintiff would not have been able to draft a retainer agreement or obtain written consent of the class once simultaneous negotiations began. As explained fully later, however, it is incumbent upon the attorney in such a case first, to prepare for such a dilemma, and second, to present the dilemma to the district judge either with a motion under the Federal Rules of Civil Procedure, or during settlement approval. Plaintiff has an ethical duty concomitant with that of defendant not to harbor a "secret plan to rescind" the agreement after the court's acceptance. *Lazar*, 757 F.2d at 438.

The above examples are not exhaustive, but it is abundantly clear that it is unreasonable to adopt a blanket rule when a case-by-case determination by the district court would encompass all such contingencies. In fact, a subcommittee of the District of Columbia Legal Ethics Committee decided to adopt

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[6] Advisory Opinion No. 39 of the State Disciplinary Board of the State Bar of Georgia declined to adopt Formal Opinion 80-94 of the New York City Bar Ass'n Comm. on Professional and Judicial Ethics, which found it unethical for defense counsel to attempt to negotiate the fee award simultaneously with negotiation of the merits. The Disciplinary Board of the Georgia Bar instead relied upon the dissent in Formal Opinion 82-80 of the New York City Bar, which cited with approval this Court's reasoning in *White*, 455 U.S. 445. The dissent in Formal Opinion 82-80 rejected the "strained and doubtful construction" of the majority, stressing a defendant's need to know the total liability before settlement.

no rule, permitting a judge to decide each case on its own merits. The Committee properly recognized that the purpose of a defendant's offer proposing fee waiver during simultaneous negotiations is not to create an attorney-client conflict or to punish or deter a plaintiff's attorney from taking fee-shifting cases. Rather, defendant is seeking to limit total exposure. The subcommittee concluded:

> The key in these situations is whether the defendant's offer is reasonable in light of all of the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty. This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client. *In both situations, the inquiry is the same and can be decided only on a case by case basis*, assessing the reasonableness of the defendant's conduct.

Final Subcommittee Report of the Committee on Attorneys Fees, *reprinted in* Bar Report, Aug./Sept. 1984 at 6 (April 11, 1984) (emphasis supplied).

In addition to preventing many valid instances of simultaneous negotiation, the overbroad rule adopted by the Ninth Circuit creates a presumption that simultaneous negotiation is improper, which defendant impliedly must rebut by showing "unusual circumstances." This rule is both unrealistic and

improper. Disciplinary Rule 5-101(A) states that a lawyer shall not accept employment if his professional judgment may be affected by his financial or personal interests. American Bar Association, *Model Code of Professional Responsibility*, as amended. Model Rule 1.2 (a) indicates that a lawyer shall abide by the client's decision whether to accept an offer of settlement. American Bar Association, *Model Rules of Professional Conduct*. Plaintiff should have the burden of proof to show why it did not prepare a retainer agreement, move the court to consider the issue under the Federal Rules of Civil Procedure, or communicate the dilemma when presenting the the settlement to the judge. *See* G. Hazard, Jr. and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* at 22 (1985) (the lawyer has a duty to communicate an offer of settlement to the client even if the lawyer believes he is acting in the client's best interest in remaining silent).

In fact, the most important avenue of relief has been all but overlooked by the Ninth Circuit: the Rule 23(e) hearing. Rule 23(e) of the Federal Rules of Civil Procedure allows the district court wide discretion to ensure that all aspects of the settlement proposal are fair to the parties, including the class. The rule states that "[a] class action shall not be dismissed or compromised without the approval of the court." *See C.* Wright & A. Miller, *Federal Practice and Procedure* § 1797 (1972). Rule 23, as explained by the court in *Moore*, "places the determination properly within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation." The trial judge can consider, among other relevant factors, the strength of plaintiff's case, the complexity and expense of further litigation, as well

as the amount of opposition to the settlement. *Manual for Complex Litigation* § 1.46 (1982). Even the critics of simultaneous negotiation allay the concerns expressed by plaintiff in the instant case by admitting that the court has wide discretion to protect the class. *See* Levin, 14 Clearinghouse Rev. at 521. In fact, one court has described the role of the district judge as "overseer" of the unnamed passive members of the class. *In Re Armored Car Antitrust Litigation*, 472 F.Supp. 1357, 1369 (N.D. Ga. 1979), *modified on other grounds*, 645 F.2d 488 (5th Cir. 1981).

Thus, the rule adopted by the Ninth Circuit both prevents simultaneous negotiation when it should be allowed, and improperly creates a presumption that negotiations are unethical when, in fact, plaintiff should have prepared for the dilemma. This Court should respect the role of the district court in approving settlements on a case-by-case basis and reverse the Ninth Circuit's overbroad rule.

C. The Court Below Erred When it did not Defer to the District Court's Approval of the Settlement, Since Such Approval did not Constitute an Abuse of the District Court's Discretion

In adopting the rule that simultaneous negotiations are presumptively unethical, the court below noted that the district court should be allowed to consider whether "unusual circumstances" warrant an exception to the *per se* rule articulated in *Prandini. Jeff D.*, 743 F.2d at 652. The court refused to give the district judge deference, however, instead adopting a theory which would reverse a district judge's determination unless, for example, the Justice Department participates as intervenor representing the public interest. *Id.* This reversal clearly was

wrong. A district court's approval of a proposed consent decree should be reversed only if its approval was an abuse of discretion. *See Mendoza v. United States*, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981); *Cotton*, 559 F.2d at 1331. In *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980), the Fifth Circuit stated that in reviewing consent decrees, "the degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved."

In the instant case, the district court had devoted substantial time and effort to a consideration of the issues involved in the settlement, and had specifically considered the ethical dilemma of the negotiations. Under these circumstances, the approval of the consent decree can be overturned only upon a clear showing of abuse of the trial court's discretion. *Miller v. Republic National Life Insurance Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). The district court did not abuse its discretion in approving the settlement and this Court should, therefore, reverse the judgment of the Ninth Circuit.

II. IF THIS COURT HOLDS THAT SIMULTANEOUS NEGOTIATION WAS IMPROPER IN THE INSTANT CASE, THE PARTIES SHOULD BE ALLOWED TO RENEGOTIATE OR PROCEED TO TRIAL ON THE MERITS IF UNABLE TO REACH AGREEMENT

As an alternative to the argument that the decision below must be reversed, this Court should not simply affirm the court of appeals' judgment. Rather, if this Court holds that the settlement agreement approved

by the district court was improper because it was the product of simultaneous negotiation, it is submitted that this Court should remand the issue for the parties to renegotiate the substantive portions of the decree, should they so desire, or to proceed to trial on the merits if they are unable to reach agreement.

The court below essentially holds that a plaintiff's waiver of the fee and cost provision of a settlement or consent decree can be modified by the court to permit a fee award. This rule would result in the alteration of a material part of the settlement agreement which was a condition to defendant's acceptance of the agreement. Such an alteration further would undermine the finality of the settlement process, and would have the effect of imposing upon a party terms that are materially different from those agreed upon. In addition, this Court should not adopt a rule that would allow a court of appeals to impose unilaterally terms that have been rejected by one or both of the parties.

This Court, in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), emphasized that consent decrees normally embody a compromise, and that "the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." In the instant case, it is clear that as a condition to the agreement to provide certain specified relief on the merits, plaintiff agreed to the "compromise" of waiving any claims for fees and costs. As this Court noted in *Armour & Co.*, the conditions on which that waiver was given must be respected. *Id.*

It is well established that a court cannot unilaterally alter a negotiated element of a consent decree. *See Plummer v. Chemical Bank*, 668 F.2d 654, 655 n.1 (2d Cir. 1982); *In Re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979); *Pettway*, 576 F.2d at 1172; *Cotton*, 559 F.2d at 1331; *Alliance To End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982); *Armstrong v. Board of School Directors*, 471 F. Supp. 800, 804 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980). As discussed above, the duty of the court of appeals is to ascertain whether the trial judge clearly abused his discretion in approving the settlement. *Mendoza*, 623 F.2d at 1348; *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The court of appeals must accord great weight to the trial judge's views. *Mendoza*, 623 F.2d at 1348. More importantly, the court of appeals is not free to delete, modify or substitute certain provisions of the settlement, but rather the settlement must stand or fall as a whole. *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976); *Allegheny-Ludlum Industries, Inc., supra.*

The Ninth Circuit did not accord great weight to the trial judge's views in altering the settlement agreement. Indeed, the court of appeals did not respect the purpose of the parties when adding a fee provision. Thus, the Ninth Circuit's reversal of the settlement agreement and a remand for a determination of attorney's fees runs contrary to this well-established line of cases and should not be affirmed by this Court. Rather, if this Court finds that the simultaneous negotiation in the instant case was

improper, the parties should be permitted to achieve a compromise through renegotiation.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed. As an alternative, it is submitted that the judgment of the court of appeals should be remanded to allow the parties to renegotiate the agreement or proceed to trial if they cannot arrive at a satisfactory resolution of the case.

Respectfully submitted,

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